Petitioner,

Minneapolis Star and
PUBLICATIONS, INC.,
Respondents.

of Certiorari to the
Supreme Court of Minnesota

ASSOCIATION,
OF NEWSPAPER EDITORS,
ASSOCIATED PRESS,
PRESS, INC.,
GANNETT COMPANY, INC.,
ASSOCIATES,
THE NEW YORK TIMES COMPANY, AND
THE TIMES MIRROR COMPANY,
IN SUPPORT OF RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-634

DAN COHEN,

Petitioner,

v.

COWLES MEDIA COMPANY, d/b/a Minneapolis Star and Tribune Company, and NORTHWEST PUBLICATIONS, INC.,

Respondents.

On Writ of Certiorari to the Supreme Court of Minnesota

BRIEF OF AMICI CURIAE ADVANCE PUBLICATIONS, INC., AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, AMERICAN SOCIETY OF NEWSPAPER EDITORS, ASSOCIATED PRESS, THE COPLEY PRESS, INC., GANNETT COMPANY, INC., NEWSLETTER ASSOCIATION, THE NEW YORK TIMES COMPANY, AND THE TIMES MIRROR COMPANY, IN SUPPORT OF RESPONDENTS*

STATEMENT OF INTEREST

Advance Publications, Inc., directly and through subsidiary corporations, publishes newspapers in 22 cities

* Written consent of all parties has been filed with the Clerk of the Court, as required by Supreme Court Rule 37.

throughout the United States, operates 16 cable systems across the country, publishes 15 magazines with nationwide circulation, and owns a major national book publishing company.

The American Newspaper Publishers Association is a nonprofit trade association representing about 1,400 newspapers. Membership constitutes about 90 percent of the total daily and Sunday newspaper circulation, and a substantial portion of the non-daily newspaper circulation, in the United States. These newspapers have the basic function of gathering and publishing news and information. ANPA brings to the case the perspective of a substantial segment of the nation's newspapers, who are directly affected by the Court's decisions in the area of First Amendment protections.

The American Society of Newspaper Editors was founded over 50 years ago. It is a nationwide, professional organization of more than 900 persons who hold positions as directing editors of daily newspapers throughout the United States. The purposes of the Society include assisting journalists in providing an unfettered and effective press in the service of the American people.

Associated Press, the world's largest news gathering organization, is a mutual news cooperative organized under the Not-for-Profit Corporation Law of the State of New York. Associated Press gathers and distributes news of local, national and international significance to its member newspapers and broadcast stations in the United States and throughout the world.

In carrying out its vital role of informing the public, Associated Press and its members have a significant interest in protecting the accurate reporting of matters of public concern and ensuring that sanctions are not imposed on the press for so reporting. They are also vitally concerned with maintaining the integrity of the editorial function, and preventing intrusion into that function that may result in obstructing public access to information key to the political process.

The Copley Press, Inc. publishes five daily newspapers in California—*The San Diego Union*, *San Diego Tribune*, *The Daily Breeze*, *The News-Pilot* and *The Outlook*—whose combined circulation exceeds 500,000 copies daily, as well as seven daily newspapers in Illinois, and operates an international news service.

Gannett Company, Inc. is a nationwide news and information company that publishes 82 daily newspapers (including *USA Today*), a variety of non-daily publications (including *USA Weekend*, a newspaper magazine) and operates 10 television stations, 15 radio stations, Gannett News Services, and the largest outdoor advertising company in North America.

The Newsletter Association is the international trade association representing 850 publishers of newsletters and specialized information services. The Newsletter Association has a long-standing commitment to the free exchange of information and opinion through the written word as protected by the First Amendment.

The New York Times Company publishes 33 newspapers, including *The New York Times*, a daily newspaper with national circulation of 1.15 million daily and Sunday circulation of over 1.7 million. The Company also publishes 17 magazines and owns five television and two radio stations.

The Times Mirror Company publishes the *Los Angeles Times*, a newspaper with a circulation of more than 1.2 million daily and more than 1.5 million on Sunday. Times Mirror also publishes seven other newspapers including *Newsday*, the *Baltimore Sun*, and *The Hartford Courant*, with a combined Sunday circulation of more than two million copies.

SUMMARY OF ARGUMENT

The relationship between reporters and their sources has historically been one of mutual trust, which gives rise to mutual ethical obligations: in providing information to a

reporter, the source has an ethical obligation to be truthful and the reporter, in turn, has an ethical obligation to keep the source's identity confidential, if the source so desires.

Petitioner is asking this Court to hold that these ethical obligations between reporters and their sources are legally enforceable obligations, disregarding the distinction between these ethical understandings and typical commercial agreements, as well as the First Amendment interests which would be adversely affected by such a decision. *Amici curiae* urge this Court to reject Petitioner's request and instead hold that the judicial enforcement of ethical obligations between reporters and their sources would violate the First Amendment in the circumstances presented here, where there was no reasonable expectation that a civilly enforceable agreement was being entered into.

The principle upon which Petitioner's case ultimately rests - that the media are not exempt from the application of general laws, such as tax, contract, and labor laws - has no relevance here. This principle applies only to nondiscriminatory regulations of commercial activities, which have no more than an incidental effect on the news gathering and dissemination process. Government actions which directly impact on the media's ability to gather and disseminate truthful information, however, fall within the ambit of the First Amendment. (See Section 1(A), *infra.*)

Accordingly, this Court must evaluate the propriety of applying general promissory estoppel principles to reporter-source understandings by weighing the interests in enforcing such understandings against the First Amendment interests in gathering and disseminating truthful information to the public. (*Id.*) That analysis demonstrates Respondents should prevail here.

First, there is no significant state interest, let alone a compelling one, in enforcing reporter-source understandings. These understandings do not have the characteristics common to civilly enforceable agreements, because they are not based on an expectation that they are legally enforceable agreements. (See Section 1(B)(i), *infra.*) Moreover, by their very nature, such understandings do not involve a "meeting of the minds," because they are typically vague, do not have precisely defined or understood terms, and involve situations where one party to the "agreement"—the reporter—cannot know what information is being provided (and, therefore, cannot know what is being agreed to) until after an assurance of confidentiality has been made. Thus, reporter-source understandings are clearly not intended to be nor can they reasonably be interpreted to be within the realm of general promissory estoppel law. (See Section 1(B)(ii), *infra.*)

Moreover, reporter-source understandings do not involve the type of interests which promissory estoppel law is designed to protect. Here, Petitioner's only interest is the purported right to engage in a political smear campaign without taking responsibility for his action. That interest is no interest at all. In any event, the obligation which arises from the reporter-source relationship is an ethical one, the enforcement of which comes from self-policing mechanisms, rather than government mandate. (See Section 1(B)(iii), *infra.*)

Second, there are First Amendment interests which would be adversely affected by the judicial enforcement of such understandings. Petitioner is seeking to inhibit the dissemination of truthful information in contravention of well-established principles protecting the dissemination of such information. (See Section 1(C), *infra.*) Moreover, the information he seeks to restrain involves the conduct of government affairs, which is at the very core of the First Amendment's protection. (*Id.*) Civil enforcement of reporter-source understandings, and the concommitant litigation which would ensue, would unquestionably chill the dissemination of such information. (*Id.*)

The strong public interest in protecting the truthful dissemination of information about government affairs outweighs the minimal or non-existent interest in enforcement of reporter-source understandings in this case. Consequently, this Court should hold, as it has in analogous

cases, that state interference with protected speech, by civilly enforcing reporter-source understandings, is constitutionally impermissible in the circumstances presented here. (See Section 1(D), *infra*; see also note 14, *infra*.)

In the alternative, if this Court believes that enforcement of such understandings is permissible in some instances, *amici* urge this Court to adopt strict requirements which must be satisfied to pursue promissory estoppel actions against the media to protect the First Amendment interests in gathering and disseminating truthful information about political affairs to the public. (See Section 2, *infra*.) Although adoption of these safeguards would not eliminate the constitutional concerns raised by *amici*, if this Court permits any promissory estoppel actions to be pursued, these devices would provide at least some measure of protection for the gathering and dissemination of information under the First Amendment and retard the growing proliferation of claims asserting a wide variety of "understandings," including purported agreements to keep identities hidden or masked, to allow pre-publication review of articles, or to give a source "favorable coverage."

ARGUMENT

1. JUDICIAL ENFORCEMENT OF AN ETHICAL OBLIGATION NOT TO PUBLISH TRUTHFUL INFORMATION ABOUT POLITICAL CAMPAIGNS VIOLATES THE FIRST AMENDMENT.

The scope of First Amendment protection for gathering and disseminating information must be determined by considering the interests served by the freedoms of speech and press, as well as any competing interests served by restricting that speech. See, *e.g.*, *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214 (1986) (when deciding whether laws that impinge on associational freedom violate the First Amendment, "a court . . . must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State, as justifications for the burden imposed by its rule. In passing judgment, the court must not only determine the legitimacy and strength of each of those interests: it must also consider the extent to which those interests make it necessary to burden the plaintiff's rights."); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 106 (1979) ("we have eschewed absolutes in favor of a more delicate calculus that carefully weighs the conflicting interests to determine which demands the greater protection under the particular circumstances presented") (Rehnquist, J., concurring); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 757 (1985) ("[t]o make this determination we . . . balance the State's interest . . . against the First Amendment interest in protecting this type of expression").

As discussed in the following sections, judicial enforcement[1] of an understanding between a source and a reporter, that would allow the source to inject misleading information into the public debate during an election in an effort to smear a political opponent, furthers no legitimate state interest, while endangering the constitutional freedom of editors to decide what to publish and the right of the public to know the whole truth about that political campaign. This Court should hold, therefore, that the First Amendment does not permit judicial enforcement of such ethical obligations in the circumstances of this case.

A. The Principle That The Media Are Not Exempt From The Application Of General Laws Is Completely Irrelevant To This Case, Which Involves A Direct Restriction On The Gathering And Dissemination Of Truthful Information To The Public.

Petitioner's entire argument is based on the premise that, because the media are not exempt from the appli-

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[1] Petitioner contends that no state action arises from judicial enforcement of civil suits for damages. That proposition has been squarely rejected by this Court. *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964).

cation of general laws, understandings between reporters and sources also must be subjected to the application of general promissory estoppel principles without any consideration of the First Amendment. (See, *e.g.*, Petitioner's Brief at 22-24.) That premise is fatally flawed.

There is no dispute that the media are, like any other citizens, subject to the application of general laws and regulations concerning commercial activities. As this Court noted in *Associated Press v. United States*, 326 U.S. 1 (1945), "[t]he fact that the publisher handles news while others handle food does not . . . afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate laws regulating his business practices." 326 U.S. at 7. In keeping with this principle, this Court has held, among other things, that the media are not exempt from the antitrust laws (*Associated Press*, *supra* (applying Sherman Antitrust Act)), from the federal labor laws (see, *e.g.*, *Associated Press v. N.L.R.B.*, 301 U.S. 103, 132-33 (1937) (applying National Labor Relations Act)), or from generally applicable taxes (see, *e.g.*, *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 587 n.9 (1983)).

This principle - that when conducting commercial activities, the media are no different from other commercial enterprises and, therefore, are subject to the application of general laws - which principle we do not dispute, simply has no application here. It *only* applies when the state action is a nondiscriminatory regulation of commercial activities,[2] which has no more than an incidental or minimal

[2] Thus, this Court has recognized that laws which differentially apply to the media must be carefully scrutinized to ensure that they are not used as tools of government censorship. For example, in *Minneapolis Star*, this Court struck down a state statute which imposed differential taxes on newspapers, noting that "[d]ifferential taxation of the press . . . places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation." *Minneapolis Star*, *supra*, 460 U.S. at 585 (footnote and citations omitted). See also *Grosjean v.*

effect on the gathering and dissemination of information to the public. In contrast, government actions which directly impact the media's ability to gather and disseminate information are subject to challenge on First Amendment grounds.[3] See, *e.g.*, *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308, 311-12 (1977) (court order restraining media from publishing name of juvenile obtained at open court proceeding violates First Amendment); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975) (invalidating, on First Amendment grounds, state statute which punished publication of rape victim's name); *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241, 258 (1974) (state statute compelling newspapers to publish "reply" by political candidates violates First Amendment).

This case falls within this latter category. The issue before this Court is not whether a media enterprise is bound by commercial agreements it has entered into, *e.g.*, an agreement to purchase newsprint, to use printing facilities, or to purchase vehicles to deliver newspapers. Application of general legal principles to those types of commercial agreements, which are only incidentally related to the news gathering and dissemination process, is plainly constitutional. Here, however, Petitioner seeks to restrict directly the media's ability to gather and disseminate information to the public, by transforming what is, at most, an ethical obligation to maintain the confidentiality of a source's identity into a legally enforceable promise. That restriction on the media falls within the First Amendment's protections.

American Press Co., 297 U.S. 233, 250, 251 (1936) (invalidating state tax which applied only to large newspapers).

[3] One noted commentator has distinguished these two areas by defining the commercial realm as encompassing "the production and exchange of goods and services for profit," while the realm of information gathering and dissemination involves "the production or exchange of ideas." T. Emerson, *The System Of Freedom Of Expression* 414 (1970); see also Note, *Freedom of Expression in a Commercial Context*, 78 Harv. L. Rev. 1191, 1192, 1194-95 (1965) (distinguishing these two areas).

The First Amendment has particular force here, because the information sought to be restrained is *truthful* information about the conduct of *government affairs*. As this Court noted in *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979), "state action to punish the publication of *truthful information* seldom can satisfy constitutional standards." 443 U.S. at 102 (emphasis added).

Indeed, under any view, the publication of information concerning matters of public concern, especially political campaigns, is at the heart of the First Amendment's protection. As this Court noted in *Mills v. Alabama*, 384 U.S. 214, 218 (1966): "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." See also *Stromberg v. California*, 283 U.S. 359, 369 (1931) ("[t]he maintenance of the opportunity for free political discussion . . . is a fundamental principle of our constitutional system"); *Brown v. Hartlage*, 456 U.S. 45, 53 (1982) ("[t]he free exchange of ideas provides special vitality to the process traditionally at the heart of American constitutional democracy—the political campaign"; thus, the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office"); *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976) ("[d]ebate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution"); *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 109 S. Ct. 2678, 2695, 2696 (1989) ("[v]igorous reportage of political campaigns is necessary for the optimal functioning of democratic institutions and central to our history of individual liberty"; consequently, it is a "value [that] must be protected with special vigilance"); *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 109 S. Ct. 1013, 1020 (1989) ("the first amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office").

Accordingly, this Court should not accept Petitioner's misleading assertion that the First Amendment has no application here because all that is involved is the application of general laws. Instead, this Court must evaluate the constitutionality of applying general promissory estoppel principles to reporter-source understandings, by assessing the interests in enforcement of such ethical obligations versus the First Amendment interests in protecting the gathering and dissemination of truthful information to the public about elections. The following sections demonstrate that when Petitioner's interests are evaluated against Respondents' First Amendment interests, Petitioner cannot overcome the First Amendment interests at stake here.

B. No Significant, Let Alone Compelling, State Interest Would Be Served By Converting Ethical Understandings Between Sources And Reporters Into Civilly Enforceable Promises.

Because of the First Amendment interests in protecting the gathering and dissemination of information to the public (see Section 1(A), *supra*, and Section 1(C), *infra*), this Court has recognized that there must be a compelling government interest which justifies using the might of the state to restrict news gathering and dissemination. (*Id.*) For example, in *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980), this Court held that the importance of protecting national security, and in particular, the effective operation of America's foreign intelligence service, were compelling interests which justified enforcement of an agreement by a former government employee to submit a manuscript to pre-publication review by the Central Intelligence Agency.

There is no similarly compelling interest here. As set forth below, the general principles of promissory estoppel simply do not apply to reporter-source understandings, which do not have the characteristics of civilly enforceable agreements and which do not involve the type of interest which promissory estoppel is designed to protect. Conse-

quently, there is no, or at most a minimal, state interest in civilly enforcing reporter-source understandings.

i. Unlike Typical Promissory Estoppel Situations, Reporter-Source Understandings Are Not Based Upon An Expectation That The Understanding Is Legally Enforceable.

The Minnesota Supreme Court held, as a matter of state law, that a reporter's promise of confidentiality does not constitute a binding contract. (Pet. App. A7-A10.)[4] Because this holding was grounded in state law, rather than federal law, it is not subject to review by this Court. See, *e.g.*, *Wainwright v. Goode*, 464 U.S. 78, 84 (1983) ("the views of the State's highest court with respect to state law are binding on the federal courts"). Consequently, the only issue before this Court is whether the state interests served by Petitioner pursuing a civil damages claim on a theory of promissory estoppel overcome the First Amendment interests at issue here. The answer is that they do not.[5]

As the Minnesota Supreme Court recognized, a claim for promissory estoppel is premised on reasonable reliance, *i.e.*, that the source reasonably relied on the promise of confidentiality. 457 N.W.2d at 203, 204. In the typical case of a reporter and a source, there simply is no such "reliance," because there is no reasonable expectation that any understanding they reach concerning confidentiality is

[4] The Minnesota Supreme Court indicated that it was "not persuaded that in the special milieu of media news gathering a source and a reporter ordinarily believe they are engaged in making a legally binding contract. . . . The parties understand that the reporter's promise of anonymity is given as a moral commitment, but a moral obligation alone will not support a contract." *Cohen v. Cowles Media Co.*, 457 N.W.2d 199, 203 (Minn. 1990).

[5] We agree with Respondents that certiorari in this case was improvidently granted, especially because this issue was not tried or briefed below.

civilly enforceable.[6] The fact that there are no prior reported cases like this one, in which a source has successfully sued a reporter for allegedly "breaching" an understanding about confidentiality,[7] demonstrates that such understandings have not previously been conceived of as legally enforceable agreements.

That conclusion is reinforced by some well-known instances in which the identity of a source has been revealed, despite an understanding of confidentiality between the

[6] This requirement should have ended the Minnesota Supreme Court's analysis, because it had already determined that the parties neither intended nor anticipated that their purported "agreement" would be anything more than a non-binding, non-enforceable moral commitment. See, *e.g.*, 457 N.W.2d at 203. At the very least, it means that Petitioner's reliance interest is not of significant weight here.

[7] Prior to *Cohen*, the closest analogy would have been *Huskey v. National Broadcasting Co., Inc.*, 632 F. Supp. 1282 (N.D. Ill. 1986), in which the district court denied the defendant's motion to dismiss a breach of contract claim brought by a prison inmate who claimed that NBC violated a provision of its agreement with the prison that forbade photographing inmates without their consent. 632 F. Supp. at 1292-93. That decision received little attention, however, and no subsequent decision has been reported. The few other cases prior to *Cohen* that raised contract claims were unsuccessful. See, *e.g.*, *Bindrim v. Mitchell*, 92 Cal. App. 3d 61, 81, 155 Cal. Rptr. 29 (1979) (affirming trial court's JNOV against plaintiff's breach of contract claim, which arose out of the defendant's agreement not to disclose any information about her attendance at plaintiff's therapy group sessions).

However, *Cohen*, and the widely publicized controversy it has generated, has provoked a substantial number of reported decisions involving breach of contract or related claims, arising out of reporters' ethical obligations not to publish certain information. See, *e.g.*, *Virelli v. Goodson-Todman Enterprises, Ltd.*, 142 A.D.2d 479, 536 N.Y.S.2d 571, 576-77 (1989) (dismissing suit for invasion of privacy and emotional distress brought by interviewees who claimed agreement not to reveal their identities was violated); *Doe v. American Broadcasting Co.*, 152 A.D.2d 482, 543 N.Y.S.2d 455 (1989) (suit by rape victims for breach of contract and emotional distress arising out of alleged violation of promise of anonymity); *Ruzicka v. Conde Nast Publications, Inc.*, 733 F. Supp. 1289 (D. Minn. 1990) (district court dismissed suit for breach of contract and other claims arising out of alleged violation of confidentiality agreement), *appeal pending*.

source and the reporter, without giving rise to litigation. See, *e.g.*, Kase, *When A Promise Is Not A Promise: The Legal Consequences for Journalists Who Break Promises of Confidentiality to Sources*, 12 Hastings Comm/Ent. L.J. 565, 576 (1990) (citing, among other instances, the disclosure of Daniel Ellsberg as the source of the "Pentagon Papers" and of Lt. Col. Oliver North as the source of information about retaliation against the terrorists who hijacked the Achille Lauro cruise ship); see also examples cited in Respondent Northwest Publications, Inc.'s Brief, Argument, Section II(B).[8]

Moreover, in this case, the source—Petitioner Cohen—was a sophisticated political insider used to dealing with the media. As the Minnesota Supreme Court recognized, "[f]or many years Cohen had been active in politics as a campaign worker, a candidate, and as an elected public official." 457 N.W.2d at 201 n.3; see also Petitioner's Brief at 21 (where Cohen adopts the Minnesota Court of Appeal's characterization of him as an "experienced political operative"). As a sophisticated public figure, who then worked in public relations, Petitioner had to know that such understandings with reporters were not civilly enforceable. Petitioner cannot claim, therefore, that he reasonably believed his understandings with Respondents' reporters were legally enforceable contracts. Because there was no reasonable reliance by Petitioner, the state interest in recognizing a promissory estoppel claim here is minimal or non-existent.[9]

[8] This is not to suggest that a decision to reveal a source's identity occurs frequently or without careful consideration. In the case involving Lt. Col. Oliver North, for example, he was identified as a source only after he publicly accused Congress of leaking secret intelligence information to the press, which he himself had provided as a "confidential source." *Two Leaks, But by Whom?*, NEWSWEEK, July 27, 1987, at 16. In another case, a Chicago Sun Times reporter identified "confidential source" Jody Powell as the source of information damaging to Senator Charles Percy, who had been critical of budget director Bert Lance, after it was learned that the information was completely false. Smyser, *There Are Sources and Then There Are "Sourcerers,"* Soc. Resp.: Journalism, Law, Med. 13, 17-18 (1979).

ii. Reporter-Source Understandings Do Not Involve A "Meeting Of The Minds."

Reporter-source understandings are also distinguishable from ordinary promissory estoppel situations because they do not involve a true agreement, upon which the parties justifiably rely. Such understandings are vague, and invariably involve terms that have no well-established meaning or that are susceptible to more than one reasonable interpretation. For example, if the source provides information on a "not for attribution" basis, the reporter may believe that he can describe the source, so long as he does not identify the source by *name* ("a government official," "a member of the defense team," "a Cabinet member"); the source, however, may intend that *no* identifying information of any kind be published. Similarly, the source and reporter may have different interpretations of the meaning of statements like "off the record," "confidentially," or "as background only." The source may intend that none of the information provided ever be published, while the reporter may believe that the information can be published, so long as it is not attributed to any source. Under these circumstances, which are quite typical, there is no true "meeting of the minds."

Furthermore, unlike typical promissory estoppel situations, the very nature of a reporter-source relationship means that the reporter does not know what information is being provided until after the assurance of confiden-

[9] As the Minnesota Supreme Court recognized, there may be circumstances in which a promissory estoppel claim could survive First Amendment scrutiny. 457 N.W.2d at 205. Thus, for example, if Petitioner had bargained for and received an explicit promise that he could bring a civil suit for damages if the confidentiality understanding was violated, a different case might be presented, because he would have had a clear expectation that a civil remedy was available. This Court does not need to decide what rule would be appropriate in that situation, however, because that situation is not presented by the facts of this case.

tiality has been extracted. Thus, there is no true "meeting of the minds" between the reporter and the source, and can never be one, because the reporter does not know the actual terms to be agreed upon.

For example, if, after extracting an assurance of confidentiality, the source "revealed" information that the reporter already knew or that the source had previously revealed to the reporter or to others *without* any discussion of confidentiality,[10] the source could not possibly believe that there was an agreement, upon which the source could justifiably rely, such that the reporter was really agreeing not to use that information.

Similarly, no source who extracts an assurance of anonymity from a reporter can possibly believe that, if he tells the reporter that he is responsible for the murder of a prominent citizen, the reporter can be held liable for payment of civil damages if he "breaches his promise" by revealing the source's identity. There simply is no "meeting of the minds" because in the usual situation, the reporter never knows what he or she is going to be told.

It is precisely this lack of any meeting of the minds that has kept reporter-source understandings in the realm of ethics rather than law. Petitioner's pretense that everyone has always known that there is a civilly enforceable "agreement" when a source is assured of confidentiality not only contradicts reality, it demonstrates the insubstantial nature of the state interest involved here.

iii. Reporter-Source Understandings Do Not Involve The Type Of Interest Which Promissory Estoppel Law Is Intended To Protect; Instead, These Understandings Create Ethical, Rather Than Legally Enforceable, Obligations.

As set forth in the preceding sections, the understandings reached by sources and reporters do not have the

[10] In this case, the Star Tribune had independently determined that Petitioner was the source of the information provided. See *Cohen*, 457 N.W.2d at 201; see also Tr. 1572-74, 1599-1601.

characteristics of promissory estoppel obligations. Instead, the obligation created is an ethical one. And, as is true of most ethical obligations, "enforcement" must come from self-policing, rather than a government command. In the case of reporter-source understandings, the mechanisms for self-enforcement of such ethical obligations include a reporter's or editor's professional disgrace, the loss of respect by their peers, and ultimately the loss of sources who no longer believe the reporter or editor to be trustworthy. These are serious penalties. They have worked so well in the past that other sources have not felt the need to sue to enforce such understandings. Indeed, Petitioner does not even attempt to show that these self-policing mechanisms are so inadequate that what always have been ethical obligations must now all be treated as civilly enforceable agreements. Thus, any state interest in civilly enforcing such ethical obligations is quite small.

In addition, the idea that there are areas in which the state has little or no legitimate interest in civilly enforcing ethical obligations is not novel, even under circumstances which give a much stronger appearance of a civilly enforceable agreement (*i.e.*, justifiable reliance and a meeting of the minds), than the case at hand. For example, social engagements may have all the characteristics of enforceable promises: an offer (invitation), acceptance (or promise to attend), and reliance on the promise, to the detriment of the relying party (*i.e.*, cancelling other plans, preparing dinner, hiring a caterer). Nonetheless, unless the parties have expressed a clear intention to be legally bound, such engagements typically are not viewed as creating civilly enforceable agreements. See, *e.g.*, 1 A. Corbin, *Corbin On Contracts*, § 34 (1963).

Similarly, agreements to refrain from marriage generally are not legally enforceable, even though such agreements involve one of the most fundamental relationships in our society and despite the fact that the failure to honor such an agreement can cause tremendous and enduring harm. See *Restatement (Second) of Contracts*, § 189 (1981).

If anything, the state interest here is even less important. Petitioner was attempting to use the media to disseminate misleading information, during an election campaign, about a political opponent and sought to prevent the dissemination of the truth: that he was the source of the smear campaign. Certainly, no important state interest would have been furthered by permitting Petitioner to accomplish this. Thus, there is little or no state interest, let alone a compelling one, in making the ethical obligation here civilly enforceable.

C. First Amendment Interests Are Furthered By Protecting The Dissemination Of Truthful Information To The Public, Particularly Where, As Here, That Information Involves Government Affairs.

This suit is aimed at restricting the rights of the media to obtain and disseminate truthful information to the public about subjects which are at the heart of the First Amendment's protection of free speech and press - the conduct of government affairs and campaigns for public office. (See Section 1(A), *supra.*) That the conduct targeted by Petitioner is encompassed by the First Amendment cannot be questioned.

This Court explicitly recognized the important First Amendment interests in news gathering in *Branzburg v. Hayes*, 408 U.S. 665 (1972). As Justice White wrote: "Without some protection for seeking out the news, freedom of the press would be eviscerated. News gathering is not without its First Amendment protections." 408 U.S. at 681. Later decisions by this Court also stand for the proposition that the gathering of information by the media, for dissemination to the public, is constitutionally protected. See, *e.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (in recognizing a constitutional right of access to judicial proceedings, this Court noted that the fact that people primarily acquire information about public affairs through the media instead of by first-hand observation "validates the media claim of functioning as surrogates for the public").

In addition, there is no question that the dissemination of truthful information to the public is protected by the First Amendment. (See cases cited in Section 1(A), *supra.*) Even where the publication of such information causes substantial harm, this Court has repeatedly held that the public's interest in receiving truthful information about matters of public concern outweighs the detrimental impact of the publication on a particular individual. See, *e.g.*, *Florida Star v. B.J.F.*, 491 U.S. 524, 109 S. Ct. 2603 (1989) (emotional injury and fear of later physical harm from dissemination of rape victim's name); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (emotional distress to parents from dissemination of rape victim's identity); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979) (harm caused by disclosure of juvenile offender's identity); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977) (same); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (harm to reputation from publication of confidential information about judicial disciplinary proceedings). The harm allegedly caused to Petitioner as a consequence of his identity being revealed, namely, dismissal from his job, is certainly no greater than the harm suffered by the plaintiffs in these cases and, indeed, is much less compelling because he is a public figure,[11] who voluntarily injected himself into the political arena.[12] See, *e.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974) ("the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased

[11] The Minnesota Supreme Court found that Petitioner was a public figure. *Cohen*, 457 N.W.2d at 201 n.3.

[12] Unlike the plaintiffs in the cited cases, Petitioner sought out the media as an instrument for manipulating the political process, through the dissemination of misleading information. Moreover, he "had many years' experience in politics and public relations," 457 N.W.2d at 201; consequently, having voluntarily entered the political arena, Petitioner cannot be heard to complain about the political sting of sunlight—"the most powerful of all disinfectants." P. Freund, *The Supreme Court of the United States* 61 (1949) (paraphrasing former Supreme Court Justice Brandeis).

risk of injury from defamatory falsehood concerning them").

Moreover, as previously discussed, the First Amendment's protection of free speech and press, particularly with regard to information about political campaigns and the conduct of government, is at the very core of the democratic process. As this Court noted in *Cox Broadcasting*, "[w]ithout the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally." 420 U.S. at 492. See also cases cited in Section 1(A), *supra*. Thus, the information at issue here is entitled to the highest level of First Amendment protection.

Subjecting reporters who reveal the identity of confidential sources to civil liability would result in the suppression of this constitutionally protected speech. As this Court has recognized, "[t]he chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure." *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965). See also *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964) (the risk of litigation may cause "would-be critics of official conduct . . . [to] be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which 'steer far wider of the unlawful zone.' ") (citations omitted).

The likelihood of protracted litigation, and its concommitant chilling effect on the exercise of First Amendment rights, is particularly pronounced here, precisely because of the oral nature of the reporter-source relationship. Typically, there is no documentation of the "agreement," nor any third party witnesses, so that the terms of the "agreement" are not objectively verifiable. As one study on reporter-source relationships noted, " '[c]onfidentiality' in these relationships often takes the form of an unspoken

trust that the reporter will treat the information with care and will know what to use and what not to use. Frequently there is not an explicit agreement about what is on and off the record." Blasi, *The Newsman's Privilege: An Empirical Study*, 70 Mich. L. Rev. 229, 243 (1971). In addition, as noted in Section 1(B), *supra*, the parties may have entirely different interpretations of the meaning of terms such as "not for attribution," "off the record," or the numerous other possible "understandings" a source may claim.

These ambiguities, which are inherent in the very nature of these relationships, create fertile ground for sources to dispute reporters' later actions. Indeed, to impose civil liability on these ethical obligations is to issue an open invitation to any source who is dissatisfied with a publication to claim later that there was an "oral agreement" or "understanding" of some sort which the reporter breached—for example, about not revealing the source's identity, not publishing confidential information, the reporter's failure to allow the source to review the article prior to publication, the failure to treat the source favorably, the failure to adequately explain the source's views, the inclusion of information or points of view the source does not wish to be associated with, and so on, *ad infinitim*.

It is certainly not uncommon for sources, when they see an actual article, to be disappointed by it and to feel unfairly treated because the reporter has not concluded that the source or the source's views are right, just, and proper and the source's opponents or their views are wrong, unwise, and immoral. If sources are allowed to continually embroil journalists in burdensome and expensive litigation, which will involve a swearing contest between the sources and the reporters about alleged oral "agreements" and "understandings," and which, therefore, will be virtually impossible to dispose of summarily, "editors might well conclude that the safe course is to avoid controversy." *Miami Herald*, 418 U.S. at 257.

Petitioner's response, namely, that enforcement of reporter-source understandings will somehow "improve" the relationship between reporters and their sources, and prevent those sources from "drying up" (Petitioner's Brief at 27-29), is untenable. Despite the fact that previous cases had not held that such understandings were legally enforceable,[13] confidential sources have and will continue to cooperate with reporters. As the district court noted in *Ruzicka v. Conde Nast Publications, Inc.*, 733 F. Supp. 1289 (D. Minn. 1990), *appeal pending*:

> It is not clear whether potential sources would dry up if reporter-source agreements were unenforceable. Confidential sources often have an interest in making their information public. That interest, and the source's relationship of trust with the reporter, may outweigh the fact that there is no legal remedy for a breach.

Id. at 1299. Petitioner has not presented any evidence whatsoever which even remotely suggests that those relationships will not continue, without a civil remedy by sources against reporters.

In any event, it is not the province of the courts to "improve" the relationship between sources and reporters, any more than it is the province of the courts to "improve" editorial judgments.[14] As this Court noted in *Miami Herald*, "[a] responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated." 418 U.S. at 256.

Even in the media, there was no consensus as to what was the proper ethical or editorial judgment here. The

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[13] See, note 7, *supra*.

[14] The government is not permitted to intrude into the relationship between reporters and their sources in this manner, any more than it should be allowed to interfere with that relationship by attempting to compel reporters to reveal the identities of their confidential sources. It is simply not up to the courts to improve relationships between sources and reporters.

Associated Press, one of the *amici* here, exercised its editorial judgment differently than the two Respondents, choosing not to disclose Petitioner's identity. (Joint App. at 11; Tr. 395.) That simply demonstrates that here, as in most cases, editorial or ethical judgments on difficult questions may differ. That very lack of a consensus as to what was "proper" conduct shows that the issue here is better left to ethics than to law.

As this Court concluded in *Miami Herald*:

> The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

418 U.S. at 258.

Just as in *Miami Herald*, the civil enforcement of reporter-source understandings would severely interfere with the media's exercise of editorial judgment. Moreover, the threat of burdensome and oppressive litigation would operate as a substantial impediment to the exercise of important First Amendment rights. These concerns outweigh the minimal (at most) state interest in civilly enforcing reporter-source understandings.

D. Application Of The Test Applied In Analogous Areas, Such As Invasion Of Privacy Cases, Demonstrates That Civil Enforcement Of Typical Reporter-Source Understandings Is Constitutionally Impermissible.

Petitioner's claim in this case, reduced to its essence, is virtually indistinguishable from the invasion of privacy claims advanced in *Florida Star* and *Daily Mail*. The basis for his claim, as in those cases, is that private informa-

tion—his identity—has been revealed and that the state has an interest in protecting him from disclosure of that information. Analyzing Petitioner's claim from the perspective of a privacy action, however, further demonstrates that the important First Amendment interests in disclosure of the "private" information outweighs any interest Petitioner has in its secrecy.[15]

The rule advanced by this Court in *Daily Mail* and *Florida Star* for evaluating the constitutionality of the government's action is that publication of truthful information, lawfully obtained, about a matter of public concern, may not be punished except to directly advance a state interest of the highest order. See *Daily Mail*, 443 U.S. at 103; *Florida Star*, 109 S. Ct. at 2613.

Here, there is no dispute that the information published by Respondents was truthful, nor is there any dispute that it involved a matter of public concern—the conduct of a political campaign.

Furthermore, there is no evidence that the information published by Respondents was obtained unlawfully. To the contrary, the only discussion of that issue in the Minnesota Court of Appeals' opinion indicates that Respondents did not violate Minnesota law in obtaining the information from Petitioner. *Cohen v. Cowles Media Co.*, 445 N.W.2d 248, 268 (Minn. Ct. App. 1989) ("[t]here was no wrongful act of [Respondents] in connection with the conduct of their reporters or in the acquisition of information peddled by [Petitioner]") (Crippen, J., concurring in part and dissenting in part). The Minnesota Supreme Court also found that there was no violation of Minnesota contract law. 457 N.W.2d at 203. Moreover, empirical evidence indicates that the methods employed by Respondents to obtain information from Petitioner were far from unorthodox, let alone

[15]Indeed, Minnesota does not even recognize a cause of action for invasion of privacy. See, *e.g.*, *Ruzicka v. Conde Nast Publications, Inc.*, 733 F. Supp. 1289, 1302 (D. Minn. 1990), *appeal pending* (citing *Stubbs v. North Mem. Medical Center*, 448 N.W.2d 78, 80-81 (Minn. Ct. App. 1989); *Hendry v. Conner*, 303 Minn. 317, 226 N.W.2d 921, 923 (1975)).

illegal. See, *e.g.*, Blasi at 239-45 (describing some of the techniques reporters use to obtain information from confidential sources).

Petitioner's response that the First Amendment does not permit the media to commit "torts and crimes" in news gathering (Petitioner's Brief at 30) misses the mark. It is certainly true that a reporter cannot commit burglary to obtain documents or murder a source, and then claim First Amendment protection. That does not mean, however, as Petitioner asserts, that there is no First Amendment protection if a "tort" is committed. To the contrary, this Court has repeatedly invoked the protection of the First Amendment to restrict the imposition of strict tort liability on the media. See, *e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 283 ("the constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct"), and its progeny.

Moreover, Petitioner's assertion that Respondents' actions were unlawful is based on circular reasoning. According to Petitioner, the First Amendment does not bar his claim because Respondents acted unlawfully, but the only supposed "unlawful" action alleged is the purported violation of the ethical understanding of confidentiality here. This begs the question of whether Respondents did anything unlawful. Respondents' acquisition of information from Petitioner was simply a "newspaper reporting technique" permitted by *Daily Mail*. 443 U.S. at 103 (asking people for information, who by law are bound not to disclose it, is such a technique).

The only remaining issue, therefore, is whether enforcement of reporter-source understandings directly furthers a state interest "of the highest order." As discussed in Section 1(B), *supra*, there is *no* state interest, let alone one "of the highest order," which justifies civil enforcement of reporter-source agreements. Moreover, the strong First Amendment interest in protecting the gathering and dissemination of information to the public easily outweighs

any minimal state interest which exists. Thus, under this Court's prior decisions in *Daily Mail* and *Florida Star*, reporter-source understandings are not civilly enforceable.

2. EVEN ASSUMING, *ARGUENDO*, THAT LIMITED ENFORCEMENT OF REPORTER-SOURCE UNDERSTANDINGS IS CONSTITUTIONALLY PERMISSIBLE, THE FIRST AMENDMENT REQUIRES APPROPRIATE SAFEGUARDS TO ENSURE THE "BREATHING SPACE" ESSENTIAL TO THE EXERCISE OF FREE SPEECH AND PRESS RIGHTS.

Even if this Court were to determine that, under some circumstances, understandings between reporters and their sources should be enforced by the courts, the important First Amendment interests in protecting the gathering and dissemination of information to the public mandate the imposition of limits on any such enforcement. As this Court noted in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974):

> In our continuing effort to define the proper accommodation between these competing concerns [*i.e.*, free speech and press and redress of individual wrongs], we have been especially anxious to assure to the freedoms of speech and press that "breathing space" essential to their fruitful exercise. . . . To that end this Court has extended a measure of strategic protection to defamatory falsehood.

Id. at 342 (citation omitted). In accordance with that concern, this Court has, as a matter of federal constitutional law, adopted various requirements in defamation cases to safeguard against the prosecution of spurious claims.[16]

[16] For example, public officials and figures are required to prove that statements were made with constitutional "actual malice," *i.e.*, with knowledge of the statements' falsity or while entertaining serious subjective doubts as to their truth or falsity. See, *e.g.*, *Harte-Hanks*, *supra*, 109 S. Ct. at 2696. Plaintiffs in cases against media defendants, where a publication of information of public interest is concerned, also have the burden of proving that the allegedly defamatory statements are false. See, *e.g.*, *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986).

Similarly, if this Court permits Petitioner and others like him to pursue promissory estoppel claims against the media, it must adopt strict standards for bringing and maintaining such actions in order to protect the First Amendment values at stake here.

First, to avoid the potential chilling effect which results from the media's engagement in protracted and expensive litigation (see Section 1(C), *supra*), marginal claims must be discouraged at the outset or must be capable of being disposed of summarily at an early stage. To accomplish this goal, plaintiffs must be required to prove by clear and convincing evidence the existence of an agreement and the clear, specific terms of that agreement. See, *e.g.*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (applying clear and convincing evidence standard in public figure defamation cases); see also *Ruzicka*, 733 F. Supp. at 1298 (purported agreement not to identify source was found to be "too vague to constitute a waiver of the defendants' first amendment rights"). Ambiguous terms or understandings should be construed against the source seeking to enforce the "agreement" or "understanding."[17]

Second, the source must expressly request and the reporter must expressly agree that any such agreement can be enforced by a civil action for damages. In this way, reporters will be put on notice that breach of *these* ethical obligations can lead to civil damages and that reporters should not proceed unless they are prepared to accept those consequences. The source must also be required to prove by clear and convincing evidence that the media's conduct clearly and intentionally violated the terms of the agreement.

Third, to protect the press from defending burdensome litigation in cases where the plaintiff was not actually dam-

[17] This goal would be further served if plaintiffs were barred from recovery on oral, as opposed to written, understandings. As one noted authority on contract law wrote, "[r]eduction to writing undoubtedly tends to prevent not only fraud and perjury but also the disputes and litigation that arise by reason of treacherous memory and the absence of witnesses." 2 A. Corbin, *Corbin on Contracts* 13 (1950).

aged by the purported "breach," the source should be required to demonstrate proof of special damages before being permitted to proceed with the lawsuit. This is consistent with the common law requirement that certain types of defamation, *i.e.*, libel and slander per quod, are not actionable without proof of special damages.[18] Moreover, consistent with the general principles of promissory estoppel, only consequential or special damages should be recoverable. See *Cohen*, 445 N.W.2d at 260-61 (Cohen was limited to recovering nonpunitive, compensatory damages resulting from the purported breach of contract).

Fourth, because media entities, no less than other enterprises, should be free from liability based upon the unratified actions of subordinate employees, this Court should hold that a media entity cannot be held civilly liable absent a showing that its representative—whether a "reporter" or an "editor"—is clearly vested with authority to accept the terms of the "agreement" on confidentiality. See, *e.g.*, *Poteet v. Roswell Daily Record, Inc.*, 92 N.M. 170, 584 P.2d 1310, 1312-13 (Ct. App. 1978) (in action for invasion of privacy, reporter's alleged promise not to reveal rape victim's name "was insufficient to show waiver without raising the additional requirement of the reporter's authority to speak for the defendant. . . . Absent authority, the statements of the reporter could not be considered as a waiver of a constitutional privilege by the defendant newspaper"); see also *New York Times Co. v. Sullivan*, 376 U.S. at 287 (state of mind for actual malice must be that of individuals "having responsibility for the publication").

Fifth, to minimize restraints on the dissemination of truthful information, this Court should hold that "agreements" or "understandings" of confidentiality are not civilly enforceable if the information which is to be kept

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[18] See, *e.g.*, *Restatement (Second) of Torts* §§ 569-575 (1977); see also W. Keeton, *Prosser and Keeton on Torts* 788 (5th ed. 1984) (special damages requirement of common law was intended to limit unmeritorious claims).

confidential—whether the identity of a source, or certain information provided by a source—is already public or has been independently obtained by the reporter through other means. See, *e.g.*, *Smith v. Daily Mail Publishing Co.*, 443 U.S. at 104-05 (even assuming that statute restricting newspapers from publishing identity of youths involved in juvenile proceedings "served a state interest of the highest order," it could not accomplish its stated purpose where other media, like radio stations, publicized that information).

Finally, because the information sought to be restrained relates to matters which are at the core of our democratic system, and, therefore, which are worthy of the most stringent constitutional protection, this Court should look to its decision in *Gertz*, which forbade the application of liability to the media in cases involving false statements without a showing of fault. 418 U.S. at 347. Because *truthful* statements should be given even greater protection (see, *e.g.*, *Florida Star*, 109 S. Ct. at 2613), this Court should adopt a high standard of fault with respect to the breach of reporter-source obligations.

For example, sources could be required to demonstrate that the reporter or editor induced the source to reveal information with representations of confidentiality that they did not intend to keep at the time those representations were made. Alternatively, the source could be required to demonstrate that the reporter or editor acted with gross irresponsibility. See, *e.g.*, *Virelli*, 536 N.Y.S.2d at 576-77.

Adoption of these safeguards does not eliminate the constitutional concerns expressed in Section 1, *supra*. To the extent that the Court is inclined to find some enforceable obligation, however, *amici* urge this Court to strictly limit the application of those principles in order to protect the important First Amendment interests involved here.

CONCLUSION

For all of the reasons set forth above, *amici* urge this Court to hold that the judicial enforcement of reporter-

source understandings, like the one in *Cohen*, would violate the First Amendment to the United States Constitution. In the alternative, if this Court determines that there are some circumstances in which such understandings should be judicially enforced, *amici* urge the adoption of the safeguards set forth above to protect the important First Amendment interests involved.

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Respectfully submitted,

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